

## REMARKS

This Amendment is submitted in response to the final Office Action mailed on September 1, 2010. A Petition for a two month extension of time is submitted herewith. The Director is authorized to charge \$490.00 for the Petition for a two month extension of time and any additional fees that may be required, or to credit any overpayment to Deposit Account No. 02-1818. If such a withdrawal is made, please indicate the Attorney Docket No. 3712036-00717 on the account statement.

Claims 1-2, 4-5 and 7-21 are pending in this application. Claims 3, 6 and 22-24 were previously canceled without prejudice or disclaimer. In the Office Action, Claims 1-2, 4-5 and 7-21 are rejected under 35 U.S.C. §103. In response, Claims 1, 4 and 7 have been amended. The amendments do not add new matter and are supported in the specification at, for example, page 7, paragraph 29. In view of the amendments and/or for the reasons set forth below, Applicants respectfully submit that the rejections should be reconsidered and withdrawn.

In the Office Action, Claims 1, 2, 4, 5 and 7-21 are rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 6,217,929 to Hahn ("*Hahn*"). In view of the amendments, and/or for at least the reasons set forth below, Applicants respectfully request that the rejection be reconsidered and withdrawn.

Currently amended independent Claims 1, 4 and 7 recite, in part, mixtures that are fluid and stable for several weeks in refrigerated form, the mixtures including a continuous mixture phase comprising flour, water, and sugar, and at least one source of fat present in the form of discrete particles distributed in the continuous phase of the mixture, wherein the source of fat in the form of discrete particles represents at least 60% of the total fat contained in the mixture, wherein the discrete particles have a mean cross section of about 0.5 mm to about 3.0 mm, and wherein the mixture has a flowability when measured by a Bostwick Consistometer after 40 seconds of between about 6 cm and about 12 cm at a temperature of 8 °C. The amendments are supported in the specification at, for example, page 7, paragraph 29. In contrast, Applicants respectfully submit that *Hahn* fails to disclose or suggest a number of elements of independent Claims 1, 4 and 7.

Chocolate fondant cakes are characterized by their crisp pastry exterior and fluid, runny or fondant melted chocolate interior. Such cakes are laborious to prepare because they involve melting chocolate and fat, two mixing steps, and the use of many kitchen accessories.

Conventional ready-to-cook mixtures have been developed to help reduce the preparation time of such cakes. However, conventional ready-to-cook mixtures transform into compact blocks that are very difficult or impossible to pour once they are refrigerated.

An advantage of embodiments of the claimed mixture is that they include a source of fat and can still maintain a liquid form at a temperature of 8 °C. This allows the simple preparation, for example, of a fondant cake by pouring the refrigerated mixture into a mold and cooking in a standard oven.

Further, Applicants have surprisingly found that the provision of a source of fat in the form of discrete particles distributed in the continuous phase of a refrigerated mixture comprising flour, water and sugar, in accordance with the present claims, makes it possible not only to conserve the fluidity of the mixture at temperatures corresponding to the usual refrigeration temperatures, but also to obtain a cooked pastry product that has desired organoleptic qualities. See, specification, pages 7-8, paragraph 31. The “discrete fat particles” means that the fat is present in the form of substantially distinct solid parts of material component that are visible to the naked eye and distributed in the continuous mixing phase. See, specification, page 4, paragraph 16. In contrast, Applicants submit that *Hahn* fails to disclose or suggest each and every element of the present claims.

*Hahn* fails to disclose or suggest ready-to-use mixtures that are fluid and stable for several weeks in refrigerated form, the mixtures including a continuous mixture phase comprising flour, water, and sugar, and at least one source of fat present in the form of discrete particles distributed in the continuous phase of the mixture, wherein the discrete particles have a mean cross section of about 0.5 mm to about 3.0 mm, and wherein the mixture has a flowability when measured by a Bostwick Consistometer after 40 seconds of between about 6 cm and about 12 cm at a temperature of 8 °C as required by independent Claims 1, 4 and 7. Instead, *Hahn* is entirely directed to a flour based batter that is spoonable at refrigeration temperatures. There are no particles sizes disclosed at any place in *Hahn*, nor does the Patent Office cite to any disclosure of same. In contrast, however, and as discussed above, Applicants have provided discrete fat particles that provide the present compositions with the requisite fluidity that is not disclosed or even suggested by *Hahn*.

Additionally, *Hahn* expressly states that “spoonable” means that “the consumer can readily spoon or scoop the batter from the container.” See, *Hahn*, column 5, lines 47-49. This is

in direct contrast to the present claims, which require “fluid” characteristics that are explicitly defined in the specification as meaning that the mixture “can be poured from its packaging” and “can flow by itself.” See, specification, page 4, paragraph [0019]. As discussed above, the discrete particles of the present compositions make it possible not only to conserve the fluidity of the mixture at temperatures corresponding to the usual refrigeration temperatures, but also to obtain a cooked pastry product that has desired organoleptic qualities. See, specification, pages 7-8, paragraph 31. As such, it is clear that *Hahn* fails to disclose or suggest the present amounts of a source of fat in the form of discrete particles as claimed in independent Claims 1, 4 and 7.

The Patent Office states that since *Hahn* discloses “identifying particulates such as fruit, chocolate, or nuts, and the like,” that *Hahn* discloses the discrete fat particles of the present claims. See, Office Action, page 3, lines 10, 13-14 and 18-19. Applicants respectfully disagree and submit that the skilled artisan would appreciate that the “identifying particulates” of *Hahn* are not the same as the presently claimed discrete fat particles. Instead, Applicants respectfully submit that *Hahn*’s inclusions would be much larger in size, as would be immediately appreciated by the use of inclusions such as fruit and nuts. Indeed, the skilled artisan would understand that such inclusions would not have a mean cross section of about 0.5 mm to about 3.0 mm as required, in part, by the present claims.

Further, *Hahn* also fails to disclose or suggest a fluid, ready-to-use mixture having a flowability when measured by a Bostwick Consistometer after 40 seconds of between about 6 cm and about 12 cm at a temperature of 8 °C as required by independent Claims 1, 4 and 7. The Patent Office asserts that *Hahn* discloses a batter mixture “substantially similar to that presently claimed,” the batter of *Hahn* “would intrinsically have a flowability” that is the same as presently claimed. See, Office Action, page 5, lines 1-4. Applicants respectfully disagree.

Applicants first note that the Patent Office has simply changed the phrase “identical” composition to “substantially similar” composition, and “inherent” to “intrinsically.” Applicants are not aware of a difference between an inherency argument and an intrinsically argument, but submit that the Patent Office maintains the “inherency” argument veiled as an “intrinsically” argument.

In the present specification, “fluid” is explicitly defined as meaning that “the mixture can be poured from its packaging into a mold easily, that is to say also that it can flow by itself without any excessive external constraint.” See, specification, page 4, paragraph [0019]. The

present specification also explicitly connects the “fluidity” to the Bostwick consistency by stating in the next sentence that “the mixture according to the invention may be characterized by its Bostwick consistency.” See, *Id.* Thus, surprisingly, Applicants have found that using “some of the fat in the form of discrete particles distributed in the mixture rather than in diffuse and continuous form makes it possible to obtain a mixture whose fluidity is satisfactory to make it pourable.” See, specification, page 4, paragraph 17. This is in direct contrast to the disclosure of *Hahn*, which fails to disclose or suggest a “fluid” or “pourable” batter having the presently claimed Bostwick consistency.

For example, *Hahn* explicitly defines “spoonable” as meaning “that the consumer can readily spoon or scoop the batter from the container.” See, *Hahn*, column 5, lines 47-49. Indeed, *Hahn* only discloses the use of the batter by “spooning” and fails to disclose that the batter can be fluid and pour on its own without external manipulations and pressures. *Hahn* goes even further to distinguish the consistency of its batters by stating that batters in the prior art “are thinner and less viscous than conventional batters” and that “[t]he batters of the invention, however, are thicker and more viscous than conventional batters, but not as viscous as doughs.” See, *Hahn*, column 10, lines 39-51.

In fact, *Hahn* explicitly teaches that the doughs of his invention are “spoonable” and are “thicker and more viscous than conventional batters,” which are, in turn, still more viscous than “thinner and less viscous” batters that are “pourable.” Because the present claims are directed to batters that are “fluid” and “pourable,” as characterized by the presently claimed Bostwick consistency, Applicants respectfully submit that *Hahn* cannot disclose the presently claimed Bostwick consistency and that the present claims are novel and nonobvious in view of *Hahn*.

As such, it is clear that the batter of *Hahn* is not fluid or pourable, as is explicitly discussed in the *Hahn* reference and, therefore, cannot intrinsically have the same Bostwick consistency as is presently claimed. Further, to satisfy the test for inherency, the Patent Office would be required to show that the batter of *Hahn* necessarily (i.e., always or automatically) has the presently claimed Bostwick consistency. That condition simply is not met under the present circumstances. The fact that a certain result or characteristic may occur or be present in the prior art is not sufficient to establish the inherency of that result or characteristic. See, MPEP 2112. *In re Rijckaert*, 9 F.3d 1531, 1534 (Fed. Cir. 1993).

For at least the reasons discussed above, *Hahn* fails to disclose or even suggest each and every element of independent Claims 1, 4 and 7, and the dependent claims that depend therefrom.

Accordingly, Applicants respectfully request that the obviousness rejection of the pending claims under 35 U.S.C. §103(a) be reconsidered and withdrawn.

For the foregoing reasons, Applicants respectfully request reconsideration of the above-identified patent application and earnestly solicit an early allowance of same. In the event there remains any impediment to allowance of the claims that could be clarified in a telephonic interview, the Examiner is respectfully requested to initiate such an interview with the undersigned.

Respectfully submitted,

K&L GATES LLP

BY 

Michael Beckett  
Reg. No. 48,127  
Customer No.: 29157  
Phone No. 312-781-6011

Date: February 1, 2011